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90-725

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ELLA SUMLIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a police officer's warrantless search of a recovered stolen purse is reasonable under the Fourth Amendment because of surrounding circumstances, where the officer is not conducting an inventory pursuant to police procedures and no other recognized exception to the Fourth Amendment warrant requirement applies.

2. Whether a police officer's warrantless search of a closed cigarette case located within a recovered stolen purse is reasonable where the only purpose of the search is to confirm owner identification and the officer is not conducting an inventory pursuant to police procedures.

3. Whether a federal district court's factual findings in a criminal case based on testimony elicited at a motion to suppress hearing can be disturbed by the appellate court absent a finding of clear error.

4. Where a warrantless police search of recovered stolen property to confirm ownership is not an inventory conducted under standard procedures, can the legitimate governmental interests which underlie the inventory search exception to the Fourth Amendment warrant requirement justify the search?

5. Where contraband is found inside a recovered stolen purse, does the break in the chain-of-custody preceding the recovery preclude a finding that the owner of the property possessed the contraband prior to the theft where no connection is established between the owner and the contraband prior to the theft?



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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 909 F.2d 1218 (8th Cir. 1990). The opinion is reprinted herein as Appendix A.

The review and recommendation of the United States Magistrate, United States District Court for the Eastern District of Missouri, denying the motion of petitioner to suppress evidence is not reported. It is reprinted herein as Appendix B.

The order of the United States District Court for the Eastern District of Missouri denying petitioner's motion to suppress evidence is not reported. It is reprinted herein as Appendix C.

The order of the Eighth Circuit denying a timely petition for rehearing is not reported. The order is reprinted herein as Appendix D. The judgment is also reprinted as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 31, 1990, affirming petitioner's criminal conviction in the United States District Court for the Eastern District of Missouri under 21 U.S.C. §841(a)(1) and 18 U.S.C. §924(c)(1). The Eighth Circuit denied a timely petition for rehearing on September 5, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, United States Constitution, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

21 U.S.C. §841(a) provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

STATEMENT OF THE CASE

This case involves a warrantless police search of recovered stolen property, a purse. The search was not conducted as an inventory, pursuant to standard police procedures. The search extended into a closed cigarette case inside the purse. The police officer conducting the search located cocaine in the cigarette case. Petitioner Ella Sumlin, owner of the purse, was the defendant in the federal court criminal proceeding below.

On or about February 25, 1988, Sumlin was indicted on one count of possession of cocaine with intent to distribute under 21 U.S.C. §841(a)(1) and one count of carrying a Colt Detective Special .38 caliber revolver during the commission of the afore-alleged felony pursuant to 18 U.S.C. §924(c)(1).

The indictment stemmed from events that occurred on the night of May 4, 1987 at Sumlin's residence in Sikeston, Missouri. Sumlin closed the grocery and package store she owns and drove to her home a few blocks from the store. Upon exiting her car in the garage attached to her home Sumlin was attacked by a masked man who came out of the dark. In the ensuing struggle the man wrenched Sumlin's purse from her possession. Sumlin grabbed a revolver from inside her car and fired to repel the intruder. The assailant fled with the purse toward the alley behind Sumlin's residence. Neighbors reported gunshots to the Sikeston Department of Public Safety. Sumlin drove back to her store where two officers took her statement.

Sumlin cooperated with the police officers, volunteered information and answered their questions. Tr. Vol. I at 114 & 138. Officer Paul Boyd took Sumlin's report wherein she described the robbery and gave a description of some of the items contained in her stolen purse, including a .38 Caliber Colt revolver complete with serial number.

Officer Boyd then proceeded directly to the alley behind the house where Sumlin reported she had last seen the robber

running. Tr. Vol. I at 140. In the middle of the alley directly behind Sumlin's residence Officer Boyd found an unzipped blue cloth bag. Approximately twenty minutes had elapsed from the time the purse left Sumlin's possession until it was recovered in the alley behind her home. H.T. Boyd at 15; Tr. Vol. I at 116.¹

There was no evidence regarding what happened to Sumlin's purse from the time it was snatched from her in the garage until the moment it was found in the alley. Tr. Vol. I at 120. Officer Boyd testified this purse matched the description of the stolen purse Sumlin had just given to him. This was the only purse found at the scene. No other robberies were reported. H.T. at 20.

Officer Boyd was relatively certain at the time of the search and seizure that this purse belonged to Sumlin (H.T. at 19), especially since it matched the description of the purse Sumlin had just provided him. Tr. Vol. I at 141. Officer Boyd searched the purse and its contents for the purpose of confirming the identity of the owner. The district court made a factual finding that Officer Boyd first came to Sumlin's bankbook and revolver and upon further search he found a closed cigarette case which contained cocaine. See Appendix B. Officer Boyd stated that he searched the cigarette case "Hoping to confirm that it was Ms. Sumlin's," since he assumed it was hers. Tr. Vol. I at 142. He acknowledged that he was "rummaging" in the purse. Tr. Vol. I at 144.

At the time of the search and seizure Sumlin was at her store or in transit from her store to the alley, a two minute drive. She arrived on the scene soon after the search of her personal effects was completed. Police prevented Sumlin from coming near the

¹ Transcript references are as follows: "H.T." refers to the Motion to Suppress or Dismiss hearing transcript. References to the second trial transcript in April 1989 are "Tr. Vol. I at ____."

scene and she was not shown the recovered items. A police officer told her a blue purse had been found. Sumlin reportedly stated, "That's not my purse. Mine's black." Tr. Vol. I at 108. No black purse was ever recovered. The seized evidence was tested for fingerprints. Sumlin's fingerprints were not found on the cocaine packets.

On June 8, 1988, Sumlin's Motion to Suppress Evidence and Dismiss the Indictment was heard before United States Magistrate William Bahn, United States District Court for the Eastern District of Missouri. The government argued only one exception to the Fourth Amendment warrant requirement: that Sumlin had abandoned the purse.

At the suppression hearing Sumlin attempted to introduce evidence concerning problems between the Sumlin family and the City of Sikeston that dated back over a generation. Sumlin contended that the exploratory search of her purse was a bad faith effort by the all white police force to plant or discover evidence of criminal activity by a black activist defendant. The magistrate excluded this evidence. H.T. Sumlin at 18-19.

On June 20, 1988, the magistrate filed his Review and Recommendation in which he denied Sumlin's motions. The magistrate found that Sumlin did not have standing to object to the seizure of her purse from the alley behind her home because of her assertions following the search that the purse did not belong to her. Additionally, the magistrate found that "the purse was not seized from the defendant, but was recovered by police following its abandonment, either by loss or theft." See Appendix B.

On July 1, 1988, Sumlin filed her objections to the magistrate's review and recommendation. On August 15, 1988, the district court entered its order overruling Sumlin's objections on grounds that a reasonable expectation of privacy did not apply to a purse that she had abandoned. See Appendix C.

On November 7, 1988, the charges against Sumlin were tried to a jury. On November 9, 1988, the court declared a mistrial when the jury could not reach a verdict. The case was tried a second time beginning April 3, 1989. At the close of the government's evidence and at the close of all the evidence petitioner Sumlin moved for judgment of acquittal on grounds of, *inter alia*, absence of essential elements of the crime. The court overruled these motions. Tr. Vol. II at 50 & 152. On April 5, 1989, the jury found Sumlin guilty on both counts. Sumlin timely moved for a new trial, and in the alternative, for judgment of acquittal notwithstanding the verdict. The trial court denied the motion on May 17, 1989.

On May 19, 1989, petitioner Sumlin was sentenced to an aggregate term of eight years in prison. She received three years imprisonment on the charge of possession of cocaine with intent to distribute and five years imprisonment without probation or parole on the firearm count, said sentence to run consecutive with the three year sentence. Sumlin was also fined \$20,000.00 and assessed \$200.00, \$100.00 on each count. Notice of Appeal to the United States Court of Appeals for the Eighth Circuit was filed on May 26, 1989.

The government contended for the first time on appeal that the inventory search exception to the Fourth Amendment warrant requirement applied in this case. After briefing and oral argument, the Eighth Circuit Court of Appeals issued its ruling on July 31, 1990. See Appendix A. The Eighth Circuit panel did not adopt the district court's finding that the abandonment exception applied to Officer Boyd's search of the purse. This was consistent with Sumlin's position that the abandonment exception was not relevant because her disclaimer of ownership took place *after* the search had been completed.

The Eighth Circuit, though, upheld the search of the purse on the basis of the surrounding circumstances. The court

acknowledged that Sumlin retained a privacy interest in her personal effects, but ruled that Officer Boyd had a legitimate interest in determining identification and recovering stolen property which outweighed Sumlin's privacy interest. The court did not find that the search came within the inventory exception or any other exception to the Fourth Amendment warrant requirement.

The Eighth Circuit's finding of Fourth Amendment reasonableness on the basis of the circumstances did not distinguish between the commencement of the search and the extension of the search into a closed cigarette case. The Eighth Circuit rejected the district court's findings of fact as to the sequence of the search, absent a finding of error. The appellate panel held that Officer Boyd located the closed cigarette case before, rather than after, he located Sumlin's bankbook and gun in the recovered purse. The court also found that the recovery of stolen property was an alternative legitimate reason for conducting the search. Officer Boyd's only claimed purpose was confirming ownership.

The Eighth Circuit did not address Sumlin's argument that the break in the chain-of-custody caused by the robbery, coupled with the absence of any nexus between Sumlin and the cocaine, precluded a finding of possession under 21 U.S.C. §841(a)(1).

REASONS FOR GRANTING THE WRIT

I.

The Decision Of The Eighth Circuit That The Warrantless Police Search Of A Recovered Stolen Purse Which Extended Into A Closed Cigarette Case Was Reasonable Solely Because Of The Surrounding Circumstances, Not Any Recognized Exception To The Warrant Requirement, Conflicts With Decisions Of This Court.

The Fourth Amendment proscribes all unreasonable searches and seizures. All “searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-defined exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted). The mere reasonableness of a search, assessed in light of surrounding circumstances, is not itself a valid exception to the Fourth Amendment warrant requirement. *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979). Rather, judicially-defined criteria govern each recognized exception to the warrant requirement. *Florida v. Wells*, ____ U.S. ____, 110 S.Ct. 1632 (1990). The circumstances of a particular warrantless search may bring it within the criteria of a recognized exception.

The Eighth Circuit did not find that the police officer’s search of the contents of the purse came within any recognized exception to the warrant requirement. The court did not adopt the district court’s finding that the abandonment exception, the only justification for the search offered by the government in the district court, applied. *United States v. Sumlin*, 909 F.2d 1218, 1220 (8th Cir. 1990). See Appendix A. The court did not find that the officer was conducting an inventory of the purse’s contents. The government raised the inventory search exception for the first time on appeal. Officer Boyd never claimed to be conducting an inventory. No evidence that the officer acted pursuant to a police department inventory procedure, much less

a procedure that governed entry into closed containers, was ever presented.

Absent any exception to the Fourth Amendment warrant requirement, the Eighth Circuit based its finding of reasonableness on the surrounding circumstances. Incorporated within this approach was the court's finding that the entire search, from its inception through intrusion into a closed cigarette case where the officer found cocaine, was justified by legitimate governmental interests.

Officer Boyd's actions were reasonable under the circumstances. A purse had been stolen. Thereafter, a purse had been found. It matched the description, as the officer remembered it, of the stolen purse. The location of the recovered purse also led the officers to believe they had found the missing purse. That belief needed to be confirmed. *Contrary to the Magistrate's finding* that the bankbook and the revolver were discovered before the cigarette case, "one of the first items [Officer Boyd] came to was a brown cigarette case ..." T.I:129. Both the bankbook and the revolver were discovered only after the cigarette case had been opened. H.T. 19; T.I:143-144. Seeking identification, as Officer Boyd testified he was about, justifies this intrusion. Further, money and a gun were in the stolen purse. Attempting to locate these valuable contents also justifies the officer's search. Either of these legitimate governmental interests—identification and recovery of stolen property—outweighs Mrs. Sumlin's privacy interests in her stolen purse. *Cf. Illinois v. Lafayette*, 462 U.S. 640, 646, 103 S.Ct. 2605, 2609-10, 77 L.Ed.2d 65 (1983) (post-arrest inventory search of a handbag was reasonable based on a range of state interests, including verification of the identity of the person arrested).

United States v. Sumlin, 909 F.2d 1218, 1220 (8th Cir. 1990) (emphasis added). See Appendix A.

The flaw in the appellate court's analysis is that it began at the wrong point—the specific circumstances surrounding this search. From that perspective the court then broadened its analysis to create, by analogy, a totality of circumstances inventory exception to the warrant requirement.

Recovered stolen property does present a situation which resembles those in which this Court has recognized an inventory exception to the warrant requirement. The starting point for Fourth Amendment analysis, though, is identification of legitimate governmental interests in a particular type of situation which support an inventory of personal property. *Illinois v. Lafayette*, 462 U.S. 640 (1983). Those interests must then be weighed against the individual's privacy interests in personal effects. If governmental interests outweigh individual privacy interests, the second step is determination of whether the criteria which this Court has established for an inventory search, standard procedures which govern the conduct of the entire inventory, have been met.

If it can be established that governmental interests exceed privacy interests in a particular type of situation so that the inventory exception to the warrant requirement applies *and* that the entire inventory was conducted pursuant to standard police procedures, analysis of each step in the inventory or of the officer's subjective concerns is not required. *Illinois v. Lafayette*, 462 U.S. 640 at 644-647.

The inventory exception is now recognized in two circumstances, search of impounded vehicles and post-arrest examination of an arrestee's personal effects. *South Dakota v. Opperman*, 438 U.S. 364 (1976); *Illinois v. Lafayette*, 462 U.S. 640 (1983); *Colorado v. Bertine*, 479 U.S. 367 (1987); *Florida v. Wells*, ____ U.S. ____, 110 S.Ct. 1632 (1990). This Court has clearly and repetitively held in these cases that an inventory conducted for legitimate purposes is, nevertheless, invalid at its inception unless it is undertaken pursuant to standardized procedures. Moreover, the extension of an inventory search into a

closed container is impermissible, absent criteria which govern this further intrusion.

Our view that standardized criteria, *ibid.*, or established routine, *Illinois v. Lafayette*, 462 U.S. 640, 648, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983), must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime,' *Bertine, supra*, 479 U.S., at 376, 107 S.Ct., at 744 (Blackman, J., concurring).

Florida v. Wells, ____ U.S. ____, 110 S.Ct. at 1635.

The Eighth Circuit panel could not and did not employ the analysis enunciated by this Court. The inventory search exception could not be extended to this case because Officer Boyd was not conducting an inventory and was not acting pursuant to police inventory procedures. Nevertheless, the court validated the search because the situation and the governmental interests resembled those present in the post-arrest situation where a warrantless inventory search is permissible. The court began its analysis with the particular circumstances surrounding the search of the purse. It then expanded to create a totality of circumstances exception to the Fourth Amendment warrant requirement.² In short, the court found that since the purpose

² The Eighth Circuit's error in finding that the totality of circumstances justified the search of the closed container is exacerbated by the fact that the circumstances of the search which the court related were themselves erroneous. The Eighth Circuit changed the district court's findings of fact as to the sequence of the police officer's search, absent any finding of error. The court also assigned to the police officer reasons for conducting the search which the officer never claimed. See Argument II, *infra*.

and conduct of this search appeared reasonable, it was close enough to an inventory to pass Fourth Amendment scrutiny.

The search of the recovered stolen purse was invalid at its inception. It was not an inventory. Even where a police officer relies on the inventory search exception, compliance with standard procedures is necessary because "an inventory search must not be a ruse for a general rummaging in order to discover criminal evidence." *Florida v. Wells*, ____ U.S. ____, 110 S.Ct. at 1635. In this case, Officer Boyd acknowledged that he was "rummaging" in the purse. Tr. Vol. I at 144. The extension of the search into the closed cigarette case was a blatant Fourth Amendment violation. A closed cigarette case is in the general class of personal effects to which the public at large has a legitimate expectation of privacy. *United States v. Chadwick*, 433 U.S. 1, 10 (1977). The intrusion into that case could have revealed other "private facts." Absent any recognized exception to the warrant requirement, intrusion into the closed case cannot be justified.

The fact that this is a federal drug prosecution should not be overlooked. Indeed, it is tempting to bend basic constitutional principles in the name of the "war on drugs." For this very reason, courts must exercise vigilance to avoid succumbing to this temptation. Two Circuit Courts of Appeal have acknowledged the dangers against which the Supreme Court long ago cautioned. In *United States v. Edwardo-Franco*, 885 F.2d 1002 (2nd Cir. 1989), the court recalled the admonition of Justice Jackson:

As Justice Jackson once wrote, "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers." *Krulewitch v. United States*, 336 U.S. 440, 457, 69 S.Ct. 716, 725, 93 L.Ed. 790 (1949) (Jackson, J., concurring). This is especially true where the conviction is for a narcotics violation at a time when the country is engaged in a

“war on drugs.” However, a courtroom is not the proper place in which to fight such a “war.” A defendant charged with a narcotics violation is presumed like every other defendant to be innocent until proven guilty beyond a reasonable doubt after a fair trial.

Id. at 1011. In *United States v. Most*, 876 F.2d 191 (D.C. Cir. 1989), the court overturned a drug conviction, rejecting the government’s argument that a warrantless search and seizure was justified solely by the totality of the circumstances.

Florida v. Wells, ____ U.S. ____, 110 S.Ct. 1632 (1990), is the latest in a series of consistent Supreme Court directives. Valid exceptions to the Fourth Amendment warrant requirement exist, but those exceptions may not be diluted or compromised by what appear to be legitimate police purposes. In this case, the Eighth Circuit failed to heed this Court’s warning. Unless the lower court’s holding is reversed, this alarming departure from basic Fourth Amendment principles remains as precedent in the Eighth Circuit and is subject to adoption by other federal circuits.

II.

The Eighth Circuit’s Finding Of Fourth Amendment Reasonableness, Based On Its Rejection Of The District Court’s Nonguilt Factual Findings, Absent Any Determination Of Error, And Its Identification Of Hypothetical Legitimate Purposes For The Search, Conflicts With Decisions Of This Court.

The Eighth Circuit’s Fourth Amendment reasonableness finding was actually a two-step departure from basic constitutional principles. First, the court erroneously proceeded from the premise that the totality of circumstances justifies a warrantless search, even though the circumstances do not bring the search within any recognized exception to the warrant requirement. The court then refashioned the factual circumstances of

the search in this case to comply with its own conclusion of reasonableness. The court rejected the district court's factual findings as to the sequence of the search, absent any determination that the district court's finding constituted clear error. The Eighth Circuit panel also relied on legitimate governmental purposes for the search, although the police officer did not claim these purposes.

Nonguilt findings of act by federal district courts in criminal cases may not be disturbed unless they are clearly erroneous. *Campbell v. United States*, 373 U.S. 487, 493 (1963); *Maine v. Taylor*, 477 U.S. 131, 145 (1986). In this case, the Eighth Circuit substituted its own factual findings, absent any finding of error by the district court.³

The Eighth Circuit panel concluded that Officer Boyd's entire search was reasonable under the circumstances. That conclusion incorporated the finding that both the commencement of the search and the intrusion into the closed cigarette case were reasonable. The court's determination rested solely on its own factual findings as to the sequence of the officer's search. *United States v. Sumlin*, 909 F.2d 1218 at 1219-1220. See Appendix A. That sequence is directly contrary to that which the magistrate found and which the district court adopted on the basis of testimony elicited at the suppression hearing. Officer Boyd testified on direct examination at the suppression hearing that he discovered the defendant's bankbook and revolver in the purse *before* he discovered the cigarette case:

Q. Okay, And what if any condition did you observe the purse as you approached?

³ By substituting its credibility finding for that of the district court, the Eighth Circuit also ignored its own prior decisions which comply with the Supreme Court directive that nonguilt findings of fact are subject to a clearly erroneous standard of review. See, e.g., *United States v. Valle*, 644 F.2d 374, 375 (8th Cir. 1981).

- A. Purse was unzipped and various contents were scattered about the purse and inside the purse.
- Q. Okay. Now did you have occasion to locate any items indicating the ownership of the purse?
- A. Miss Sumlin's bankbook was in the purse. Also, the revolver which she had advised me of earlier was in there and the serial numbers matched.
- Q. What if anything did you do with those items, the purse and its contents?
- A. I was checking through the purse in attempting to determine any *further* ownership, if I could find a driver's license or anything like that. I opened the cigarette package or a cigarette case, a leather cigarette case. H.T. at 9 (emphasis added).

On cross-examination Officer Boyd changed the sequence of the search. The following colloquy took place:

- Q. There was no other indication of the owner of that purse's identification, any other part of the purse or ...
- A. Her bank book was in there, but I came to that second. I came to the purse first. The cigarette case first. H.T. at 19.

On the basis of Officer Boyd's testimony, the Magistrate's factual finding was as follows:

Boyd stated that he located a bank book and a revolver with matching serial number to the one described by Sumlin inside of the purse. Boyd testified that he continued to look through the purse and opened a cigarette case, which appeared to contain plastic bags of cocaine. Boyd stated that at that point, the purse was seized.

See Appendix B.

The Eighth Circuit panel concluded that, contrary to the magistrate's finding, Officer Boyd discovered the defendant's bankbook and revolver only after the cigarette case had been opened. *United States v. Sumlin*, 909 F.2d 1218 at 1220. See Appendix A. The panel completely ignored the officer's direct examination at the suppression hearing, relying instead on the suppression hearing cross-examination testimony and subsequent trial testimony.

Determining the facts in connection with a suppression motion in a criminal case is the function of the district court, not the appellate court. The Eighth Circuit did not determine that the district court's findings of fact as to the sequence of the search were clearly erroneous or even erroneous. The court simply disagreed and made its own credibility finding based on its review of the record, including subsequent trial testimony.

This reordering of the facts was critical to the court's reasonableness finding. The scope of a search may not exceed its purpose. *Coolidge v. New Hampshire*, 403 U.S. 443, 466-468 (1971). Since Officer Boyd's only purpose was to confirm that petitioner owned the recovered purse, his purpose was accomplished once he located petitioner's bankbook and handgun within the purse. No other purpose for opening a closed cigarette case existed. The reordering of facts whereby Officer Boyd located and opened the closed cigarette case before he located Sumlin's bankbook and revolver substantially contributed to the court's determination that the search was reasonable.

Closely related to the reordering of the sequence of the search was the court's determination that locating stolen property, money and a gun, also justified Officer Boyd's search. *United States v. Sumlin*, 909 F.2d at 1220. See Appendix A.

The only reason Officer Boyd ever stated for commencing his search was to confirm the relative certainty he already had that

Sumlin owned the recovered purse. *United States v. Sumlin*, 909 F.2d at 1220. H.T. at 9, 19-20. He did not open the purse, much less the closed cigarette case, pursuant to an inventory procedure. He did not claim to be looking for Sumlin's gun or money. Hypothetically, the recovery of stolen property, including a weapon, could be claimed as the justification for conducting an inventory search, pursuant to standardized criteria, in a similar circumstance. In this case, however, Officer Boyd's singular purpose in examining the contents of the purse was confirmation of ownership.

By basing its reasonableness determination on hypothetical legitimate governmental purposes, the court below actually rendered an advisory opinion, in violation of the constitutional Article III, §2 case or controversy requirement.

As noted, the Eighth Circuit's approach began with the particular circumstances of this search from which it constructed a totality of circumstances warrant requirement exception. Yet, it also digressed from its own approach by mixing hypotheticals with the actual circumstances of this search. This resulted in a hybrid conclusion. On the one hand, the court analogized the legitimate governmental interests which supported an inventory search exception in *Illinois v. Lafayette*, 462 U.S. 640 (1983), to the situation of the recovered stolen property. The officer in this case was, however, not conducting an inventory pursuant to departmental procedures, so the search could not come within the inventory exception. On the other hand, even if the totality of circumstances approach which the court employed could withstand Fourth Amendment scrutiny, the actual circumstances of this search did not support a finding of reasonableness. The Eighth Circuit's *sua sponte* reordering of the sequence of the search and injecting of hypothetical legitimate reasons for the search speciously overcame this obstacle.

Finally, this case serves to illustrate the reason for this Court's insistence that police inventories of personal effects be conducted pursuant to established departmental procedures. Application of evenhanded procedures are especially important where, as here, there is a strong "undercurrent of racial conflict." *United States v. Sumlin*, 909 F.2d at 1221. Adherence to uniform department policy with regard to such inventories would dispel an inference of discriminatory motive against minority suspects. Such a legitimate procedure would help counter Sumlin's charge—which she was prevented from proving—that, but for her race, her purse would not have been subjected to the officer's "rummaging."

III.

The Eighth Circuit's Decision To Affirm The Conviction, Despite The Absence Of Any Connection Between The Petitioner And Cocaine Located Within A Recovered Stolen Purse, Conflicts With Decisions Of This Court.

When a defendant challenges the sufficiency of the evidence used to convict, the critical inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). In this case, the Eighth Circuit did not address petitioner's claim that the trial court should have granted petitioner's motion for directed verdict because there was no evidence that petitioner "possessed" cocaine within the meaning of 21 U.S.C. §841(a)(1).

In order to convict petitioner of the charged offense, the government had to prove beyond a reasonable doubt that she knowingly possessed cocaine with the intent to distribute. *United States v. Matra*, 841 F.2d 837, 840 (8th Cir. 1988). The requisite possession could be either actual or constructive possession.

The government contended that this case turned on the issue of petitioner's *actual* possession of cocaine prior to the theft of her purse. A finding of actual possession must be based upon some showing that petitioner had the cocaine on her person or within her immediate reach. *United States v. Staten*, 581 F.2d 878, 883 (8th Cir. 1973). Petitioner was not apprehended with cocaine on her person or within her immediate reach. No witness observed her in actual possession of cocaine at any time. She was not under police surveillance. Petitioner did not claim the cocaine as her property. In short, no evidence was presented that petitioner ever had possession of the cocaine. A description of stolen property provided to police by a crime victim is not an admission of ownership as to *all* property subsequently recovered at the scene of the crime.

Furthermore, the government had no evidence of constructive possession. Constructive possession is "knowledge of presence plus control." *United States v. Shurn*, 849 F.2d 1090, 1093 (8th Cir. 1988), citing *United States v. Wajda*, 810 F.2d 754, 761 (8th Cir. 1987), *cert. denied*, 481 U.S. 1040 (1987). In *United States v. Massey*, 687 F.2d 1348 (10th Cir. 1982), the court succinctly defined constructive possession as "the ability to reduce an object to actual possession."

The break in the chain of custody of the purse prior to its seizure and search by police officers precluded a finding of possession. The purse was in the hands of a fleeing felon for about twenty minutes. H.T. at 15; Tr. Vol. I at 116. There was no evidence whatsoever as to what happened to the purse from the time it was snatched from petitioner at her home until it was found in the alley. Tr. Vol. I at 120. Under the circumstances of this case, that break in the chain of custody necessarily made any conclusion as to ownership of the cocaine pure conjecture. "The government's burden of proving each and every element of the crime cannot be diluted by unwarranted presumptions about the evidence it seeks to introduce." *United States v. Teslim*, 869 F.2d 316, 324 (7th Cir. 1989).

The term chain of custody in criminal jurisprudence typically refers to maintaining the integrity of evidence from the time of seizure to the time of trial. Chain of custody issues arise much less frequently at the stage *prior* to seizure of criminal evidence. The chain of custody is not broken where there is a pre-seizure connection between the defendant and the contraband and the defendant voluntarily breaks the chain. Under the following sequence of events the integrity of the evidence is not compromised: (1) direct evidence of defendant's actual possession prior to the seizure; (2) defendant's abandonment or voluntary transfer of property prior to seizure; and (3) seizure of property by police officers. *United States v. Galvan-Garcia*, 872 F.2d 638 (5th Cir. 1989); *United States v. Lampson*, 627 F.2d 62 (7th Cir. 1980).

Where, however, there is no pre-seizure connection between the defendant and the contraband, the jury's determination can only be conjecture. *United States v. Teslim*, 869 F.2d at 324. In this case there was no direct or circumstantial evidence emanating from a point in time prior to the police seizure that linked petitioner to the cocaine. No one observed her with the cigarette case or with cocaine prior to the robbery. There was no voluntary transfer or abandonment of the purse to the masked robber. Clearly, petitioner had no knowledge of control of events during the approximately twenty minutes from the time of the robbery to the time of the recovery of the purse. There was ample time and opportunity for the deposit of the cocaine by the perpetrator of the crime. The contents of the purse were scattered. Some of petitioner's possessions were found in the alley. Some of her possessions were never recovered. Her fingerprints were not found on the cigarette case or any of the cocaine packets.

Under the circumstances of this case, without any connection between the petitioner and the cocaine prior to the seizure, "the jury would have been unable to connect the cocaine to the defendant." *United States v. Teslim*, 869 F.2d at 324. The

absence of any evidence of petitioner's spatial proximity to the cocaine at any time, much less actual possession, compelled a directed verdict. To do otherwise is to impose upon every victim of a street theft a criminal accountability for all items recovered. Spatial proximity between the owner's property and other items (counterfeit bills, jewelry and drugs) found in recovered automobiles, purses and briefcases would trigger prosecution of the crime victims.

CONCLUSION

Based on the foregoing reasons, the petitioner, Ella Sumlin, respectfully requests that this Court grant her Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

David C. Howard
304-A North Euclid
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(314) 454-1722

Attorney for Petitioner



APPENDIX

APPENDIX A

UNITED STATES of America, Appellee,

v.

Ella SUMLIN, Appellant.

No. 89-1930EM.

**United States Court of Appeals,
Eighth Circuit.**

Submitted Dec. 15, 1989

Decided July 31, 1990

Defendant was convicted before the United States District Court for the Eastern District of Missouri, William L. Hungate, J., of having cocaine and intending to sell it, and of carrying a firearm during the crime, and she appealed. The Court of Appeals, Arnold, Circuit Judge, held that: (1) defendant's reasonable expectation of privacy in purse which she had reported stolen was not violated by officer's search of purse, during which cocaine was discovered, and (2) evidence was sufficient to sustain conviction.

Affirmed.

1. Searches and Seizures

Defendant's reasonable expectation of privacy in her stolen purse was not violated by officer's search of her purse upon its recovery; legitimate governmental interests of identification or recovery of stolen property outweighed defendant's privacy interests in her purse, and justified officer's opening of cigarette case in purse, which was found to contain cocaine.

2. Drugs and Narcotics

Evidence was sufficient to sustain conviction for possessing cocaine; cocaine was found in purse which officer testified mat-

ched description of Defendant's purse which she had reported stolen; moreover, although defendant subsequently denied that purse which officer found was hers, officers found items in purse which confirmed her ownership, and other personal items belonging to defendant were found in alley where purse was recovered.

David C. Howard, St. Louis, Mo., for appellant.

Dean Hoag, St. Louis, Mo., for appellee.

Before ARNOLD, FAGG, and MAGILL, Circuit Judges.

ARNOLD, Circuit Judge.

Ella Sumlin was convicted by a jury of having cocaine and intending to sell it, and of carrying a .38 revolver during her crime. This conviction came after her second trial; the first jury was unable to reach a verdict. She was sentenced to eight years in prison (three for possessing the drug and five for carrying the gun), and fined \$20,000. Sumlin now appeals her conviction. She alleges two errors below: The District Court's¹ failure to suppress the cocaine used to convict her, and the sufficient of all the evidence supporting her conviction.

We affirm her conviction. Sumlin's motion to suppress was rightly denied. The search that revealed this evidence was reasonable given the circumstances of stolen property described below. Furthermore, the jury's verdict is adequately supported by this record. The cocaine and the revolver were found in what the jury could have reasonably believed to be the appellant's purse.

¹ The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri. Judge Hungate adopted the reasoning and conclusions of Magistrate William S. Bahn's Review and Recommendation on Sumlin's motion to suppress.

This case arose from happenstance rather than investigation. Sumlin was robbed of her purse as she arrived home late one night. She retrieved a pistol from her car and shot several times at the fleeing robber. Officers of the Sikeston Department of Public Safety (the same individuals double as police and fire fighters) responded. Neighbors had reported the gun-shots. The officers didn't find Sumlin at her house. Neighbors who had already arrived on the scene directed them to Sumlin's convenience store a few blocks away. She had returned there after the robbery. Two officers took Sumlin's statement, including a description of her purse and its contents. All agree that she was cooperative, and that she told the police her purse contained \$200 and a .38 revolver serial # P53569. The officers testified, and the jury apparently believed, that she also said her purse was blue. Sumlin maintains that her purse was black, and that she said so then.

The police returned to the crime scene after the interview. In the grassy alley immediately behind the appellant's house, they found an unzipped blue cloth purse. Various personal items were also found scattered about the alley. Officer Boyd testified that he looked inside the purse for identification to confirm Sumlin's ownership. Suppression Hearing Transcript (H.T.) 9,19-20. One of the first things he found was a leather cigarette case. He opened it, relying on his experience that women often carry a driver's license or credit cards inside cigarette cases. H.T.19. Instead of any identification, he found a large quantity of small cellophane bags containing a fine white powdery substance. H.T.9-10. (The substance was later determined to be cocaine.) Continuing to look through the purse, he found a bank passbook for a savings account in the appellant's name. H.T.19. Digging further, he felt a revolver at the bottom of the bag. Trial Transcript (T.) I:129, 142-144. (The serial number on that pistol was later matched to the number on the appellant's stolen gun. T. I:129, 144.) When Sumlin returned to the scene, she saw the retrieved purse and denied that it was

hers. She explained to the officers, as she says she had told them earlier, that her purse was black. T. I:142.

[1] The Magistrate denied the appellant's motion to suppress the cocaine. He held that Sumlin lacked standing to challenge the search because she denied owning the purse and, at any rate, it had been abandoned. Review and Recommendation 5. The District Court adopted and incorporated this analysis, while noting that "[t]he question also persists as to 'what is a reasonable expectation of privacy in a purse that has been stolen?' " No. 88-47CR(3), 2 (E.D.Mo. Aug. 15, 1988) (order denying defendant's motion to suppress). We express no view on the Magistrate's and District Court's analysis of this search under the rubric of standing. Rather, we address the "persist[ing]" question: assuming *arguendo* that the recovered purse was hers, was Mrs. Sumlin's reasonable expectation of privacy in her stolen purse violated by Officer Boyd's search? We do not believe so. We hold that Mrs. Sumlin's (assumed) expectation of privacy in her stolen purse was not violated by this intrusion.

Officer Boyd's actions were reasonable under the circumstances. A purse had been stolen. Thereafter, a purse had been found. It matched the description, as the officer remembered it, of the stolen purse. The location of the recovered purse also led the officers to believe they had found the missing purse. That belief needed to be confirmed. Contrary to the Magistrate's finding that the bank-book and the revolver were discovered before the cigarette case, "one of the first items [Officer Boyd] came to was a brown cigarette case...." T. I:129. Both the bank-book and the revolver were discovered only after the cigarette case had been opened. H.T. 19; T. I:143-144. Seeking identification, as Officer Boyd testified he was about, justifies this intrusion. Further, money and a gun were in the stolen purse. Attempting to locate these valuable contents also justifies the officer's search. Either of these legitimate governmental interests—identification and

recovery of stolen property—outweighs Mrs. Sumlin's privacy interests in her stolen purse. *Cf. Illinois v. Lafayette*, 462 U.S. 640, 646, 103 S.Ct. 2605, 2609-10, 77 L.Ed.2d 65 (1983) (post-arrest inventory search of a handbag was reasonable based on a range of state interests, including verification of the identity of the person arrested).

[2] The appellant next argues that the District Court erred in not granting her motion for acquittal at the close of the government's case. She argues that there is insufficient evidence supporting her conviction for possessing cocaine. (Mrs. Sumlin doesn't dispute that she carried the .38 pistol. The legal significance of that act, however, hinges on the jury's conclusion on the possession charge.)

The jury in this case was offered alternative stories to explain what happened to Mrs. Sumlin's purse. The defendant's story was that the contents of her stolen black bag somehow got mixed up with a cigarette case full of cocaine. There was extensive testimony from Sumlin's neighbors, who reached the scene before the police, that nothing was in the alley then—no purse (blue or black) and no scattering of personal items. T. II:72, 97. Two other witnesses also testified that the handgun was found on the ground near one side of the alley rather than in the blue purse. T. II:102, 120. And finally, Sumlin's daughter testified that her mother nearly always carried a black vinyl purse, unlike the blue one found in the alley. T. II:136-139. The implication, spelled out in the closing arguments, was that the cocaine was not hers. Either the robber left it (and the blue bag) behind in his haste, or the police planted the cocaine, and then found it, to "get" Mrs. Sumlin. T.II:187-189, 171-172. The jury was asked to acquit on either possibility.

The government offered a different explanation. The appellant's purse was stolen, and she described it and some of its contents to the police, never expecting to get it back. The man who robbed her didn't have time to realize what he had, and in a hail of bullets, left her purse and most of its contents in the

alley. There the police found a purse matching the description they received and checked the contents to confirm ownership. They inadvertently discovered nearly 60 grams of cocaine, packaged in small amounts as if for distribution. T. II:39. The officers also found items in the purse confirming Sumlin's ownership: the pistol she described to them and her bank-book. Scattered around the alley were more items connecting the appellant with the scene—a letter addressed to her and her husband, a key ring she later identified as her own, and a compact with her fingerprint on it. T. I:131-132, 170; II:18. When she returned to the alley and discovered the police had found the purse (and probably its contents), she changed her story. Her purse wasn't blue after all, it was black.

The jury accepted the government's story of what happened. There is evidence to support both versions. If one credits the defense witnesses, the blue purse and the cocaine seem to appear out of nowhere. If, however, one credits the investigating policemen, Sumlin's constructive possession of cocaine prepared for distribution is a reasonable inference. This case properly went to the jury. And viewing the evidence in the light most favorable to the government, we decline to disturb the jury's conclusions. *United States v. O'Connell*, 841 F.2d 1408, 1424 (8th Cir. 1988), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 799, 102 L.Ed.2d 790 (1989). This case is far from a successful sufficiency-of-the-evidence claim, where a "reasonable-minded jury *must* have entertained a reasonable doubt as to the government's proof of one essential element of the offense." *United States v. Noibi*, 780 F.2d 1419, 1421 (8th Cir. 1986) (emphasis in original).

One final aspect of this case deserves mention. Throughout the record and briefs there is an undercurrent of racial conflict. The defendant is black. Her witnesses—her neighbors and relatives—are more than likely also black because they all live in the same predominately black section of Sikeston, though we can't be certain from the record. Sumlin asserts in her brief that

all the members of the Sikeston Public Safety Department are white, and that because of this difference in race, the officers are on less than friendly terms with her and her family. Appellant's Brief 1-2. She notes that these circumstances are relevant to this case, and they are. But this is the kind of conflict whose impact on the case is best left to the jury. At Sumlin's request, voir dire was conducted on the impact of the defendant's race. No potential juror expressed any reservation regarding the ability to serve without a predisposition rooted in race. And though we cannot determine from the record the race of the jurors, we nonetheless put our faith in their impartiality and judgement.

The judgment of the District Court is affirmed.

APPENDIX B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 88-47CR(3)

**UNITED STATES OF AMERICA,
Plaintiff,**

v.

**ELLA SUMLIN,
Defendant.**

Filed: June 26, 1988

MAGISTRATE'S REVIEW AND RECOMMENDATION

This case is currently before the Court for consideration of defendant's pretrial motions, pursuant to 28 U.S.C. §636(b). Defendant has been charged in a two count indictment with possession of cocaine in violation of 21 U.S.C. §841(a)(1), and unlawful carrying of a firearm in the commission of a felony in violation of 18 U.S.C. §924(c)(1). A hearing was held on June 8, 1988.

**MOTION FOR LEAVE TO FILE
ADDITIONAL AND SUPPLEMENTAL MOTIONS**

This motion is **HEREBY GRANTED** subject to District Court approval.

**MOTION TO REQUIRE THE GOVERNMENT
TO REVEAL ANY AGREEMENT ENTERED INTO
BETWEEN THE GOVERNMENT AND ANY
PROSECUTION WITNESS**

The government represents that no such agreement has been entered into. Therefore, this motion should be **DISMISSED AS MOOT**.

**MOTION FOR PRODUCTION
OF FAVORABLE EVIDENCE**

The government represents that it is currently unaware of the existence of any favorable evidence in this case. Further, the government represents that it is aware of its continuing duty pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), to provide such favorable evidence should it become available. Therefore, this motion should be DISMISSED.

MOTION FOR DISCOVERY AND INSPECTION

The government represents that this is an "open" file case, and as such, has complied fully with the parameters of Rule 16, Fed.R.Cr.P. The government further represents that all police and laboratory reports have been provided to the defendant. Therefore, this motion should be DISMISSED AS MOOT.

**MOTION TO REQUIRE THE GOVERNMENT
TO REVEAL THE IDENTITY OF UNDERCOVER
GOVERNMENT INFORMANTS OR AGENTS**

The government represents that there were no undercover government informants or agents used in the investigation of this case. Therefore, this motion should be DISMISSED AS MOOT.

**MOTION TO SUPPRESS EVIDENCE AND
TO DISMISS THE INDICTMENT**

Defendant attempts to suppress the introduction into evidence of a purse allegedly seized from the alleyway behind defendant's home at 331 West Gate. Testimony was heard from Paul Boyd of the Sikeston Public Safety Department. Boyd stated that he was on duty on May 4, 1987, at approximately 11:36 p.m. when he was dispatched to a call regarding gun shots in the vicinity of West Gate and Compress in Sikeston, Missouri. Boyd testified that he discovered that the residence at 331 West Gate had been robbed. Boyd then identified defen-

dant Ella Sumlin as the resident of 331 West Gate. Boyd stated that he interviewed Sumlin regarding the robbery. Sumlin told Boyd that a black male had grabbed her purse from her in her garage at 331 West Gate.

Boyd testified that he then conducted a search for a blue purse, which defendant stated was to have contained \$200.00, a Colt revolver with the indicated serial number and some personal papers. Boyd stated that he located a purse in the alley approximately thirty feet behind Sumlin's home. Boyd testified that the purse was unzipped and that various contents were scattered in the alley.

Boyd stated that he located a bank book and revolver with matching serial number to the one described by Sumlin inside of the purse. Boyd testified that he continued to look through the purse and opened a cigarette case, which appeared to contain plastic bags of cocaine. Boyd stated that at that point, the purse was seized.

Boyd testified that Sumlin drove up the alley as he was checking the contents of the purse. Boyd stated that Sumlin said, "That's not my purse."

On cross-examination, Boyd testified that two other police cars were dispatched to the robbery call. Boyd identified Defendant's Exhibits A and B as photographs of the alley behind defendant's residence. Boyd stated that these photographs were fair and accurate representations of the alley, although the photographs had been taken during daylight, while the incidents in question occurred at night. Boyd stated that items from the purse were found in a grassy area approximately fifteen minutes after he had talked with Sumlin at her store. Boyd testified that the light pole in the alley was lit during the evening of May 4, 1987. Boyd stated that he was the first to arrive on the scene, but that he did not observe anyone else in the area. Boyd went onto testify that no robbery suspect was ever apprehended, and that he understood the investigation to be ongoing. Boyd con-

cluded by stating that he opened the cigarette case because he thought that some form of identification may have been found in there.

Defendant introduced testimony from John Yarber of Sikeston, Missouri. Yarber testified that he was standing on a corner at Felker Street on the evening of May 4, 1987, when he heard a total of four to five shots. Following that, Yarber stated that Ella Sumlin drove around the corner yelling that she had "been robbed." Yarber testified that at that point, he jumped into his truck and proceeded to the defendant's home, where he drove down the alley behind Sumlin's home. Yarber stated that no street lights were on in the alley at that time. He also testified that he did not see any other police officers while there. Yarber did state that he noticed skid marks at the end of the alley. Yarber testified that he did not see a purse in the alley.

Upon cross-examination, Yarber stated that at the time he saw Sumlin drive around the corner, he was standing with four other people. Yarber testified that he did not see any of his group talk to the police.

Further testimony was heard from Dennis Sumlin, the son of the defendant Ella Sumlin. Sumlin stated that he received a call from his sister on the evening of May 4, 1987, and proceeded to his mother's home. Sumlin stated that at the time of his arrival, the police had blocked off the alley behind his mother's home. Sumlin testified that he approached the scene, but was directed by officers to step back. Sumlin stated that he saw a purse in the alley, which he identified as a floral print, cloth purse. Sumlin went onto testify that his mother normally carries a large black leather bag.

Testimony was then heard from Detective Bob Gee of the Sikeston Department of Public Safety. Gee stated that he was not part of the Sumlin investigation on the evening of May 4, 1987. Gee testified that he requested defendant Sumlin to come

to the police station a few days after the robbery. Gee stated that Sumlin was advised of her *Miranda* rights upon her arrival in his office. Gee testified that defendant Sumlin asked, "Do you have my purse?" Sumlin told police that the bag she was shown was "not my bag." He testified that Sumlin was shown a blue polka-dot purse.

From the testimony presented to the Court, it would appear that defendant Ella Sumlin does not have standing to object to the seizure of the purse from the alley behind her home pursuant to her repeated assertions that the purse did not belong to her. Additionally, the purse was not seized from the defendant, but was recovered by police following its abandonment, either by loss or theft. -

Therefore, defendant's Motion to Suppress Evidence and to Dismiss the Indictment should be DENIED.

The parties are hereby advised that they have eleven days from the service of this recommendation within which to file objections to same, pursuant to 28 U.S.C. §636(b); failure to object could bar any appeal.

Dated this 20 day of June, 1988.

/s/ William S. Bahn
UNITED STATES MAGISTRATE

APPENDIX C

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 88-47CR(3)

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELLA SUMLIN,

Defendant.

Filed: Aug. 15, 1988

ORDER

This matter is before the Court on various pretrial motions filed by defendant.

Pursuant to 28 U.S.C. § 636(b), all pretrial matters were referred to United States Magistrate William S. Bahn. The Magistrate held an evidentiary hearing on defendant's pretrial motions. Thereafter, on June 20, 1988, Magistrate Bahn filed his Review and Recommendation. On July 1, 1988, defendant Sumlin filed her objections to the Review and Recommendation.

After considering the evidence, the Magistrate recommended that defendant's motion to suppress evidence and to dismiss the indictment be denied. Magistrate Bahn concluded that defendant did not have standing to object to the seizure of the purse from the alley behind her home pursuant to her repeated assertions that the purse did not belong to her. The Magistrate further concluded that the purse was not seized from defendant but was recovered by police following its abandonment, either by loss or theft.

Defendant objects to the Magistrate's recommendation as it relates to the motion to suppress evidence and to dismiss the indictment. Defendant argues that the purse was seized without a warrant and no exceptions to the warrant requirement are applicable. Defendant further asserts that under the totality of the circumstances, the government's position that defendant abandoned the contents of her stolen bag is not supported. The defendant further contends that bad faith actions were exhibited on the part of the government and its agents.

The Court notes that a citizen's reasonable expectation of privacy is customarily honored in the law. This would apply to safeguard items in the home and in the automobile under appropriate circumstances. It would not seem to apply to a purse to which the person denied ownership.

The question also persists as to "what is a reasonable expectation of privacy in a purse that has been stolen?"

Upon careful consideration of the record,

IT IS HEREBY ORDERED that defendant's objections to the Magistrate's Review and Recommendation are overruled.

IT IS HEREBY FURTHER ORDERED that the Magistrate's Review and Recommendation is sustained, adopted, and incorporated herein.

IT IS HEREBY FURTHER ORDERED that defendant's motions to require the government to reveal the identity of any undercover government informants or agents; for discovery and inspection; and to require the government to reveal any agreement entered into between the government and any prosecution witness that could conceivably influence their testimony are dismissed as moot.

IT IS HEREBY FURTHER ORDERED that defendant's motion to suppress evidence and to dismiss indictment is denied.

IT IS HEREBY FURTHER ORDERED that defendant's motion for production of evidence favorable to the accused is dismissed.

IT IS HEREBY FURTHER ORDERED that defendant's motion for leave to file additional and supplemental motions is granted subject to this Court's approval.

Dated this 15th day of August, 1988.

**/s/ William L. Hungate
UNITED STATES
DISTRICT JUDGE**

APPENDIX D

**United States Court of Appeals
For The Eighth Circuit**

No. 89-1930EM

**United States of America,
Appellee,**

v.

**Ella Sumlin,
Appellant.**

**Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc**

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

September 5, 1990

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

**United States Court of Appeals
For The Eighth Circuit**

No. 89-1930EM

**United States of America,
Appellee,**

v.

**Ella Sumlin,
Appellant.**

**Appeal from the United States District Court
for the Eastern District of Missouri.**

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 31, 1990

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 9/18/90